DOCUMENT RESUME

ED 091 112 RC 007 873

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TITLE Eskimo and American Indian Studies Curriculum Development Regarding American Native Oral Tradition: Legal Safeguards and Public Domain--A Discussion.
PUB DATE Jan 74
NOTE 56p.

EDRS PRICE MF-$0.75 HC-$3.15 PLUS POSTAGE
DESCRIPTORS Administrative Policy; *American Indians; Court Litigation; *Cultural Background; Definitions; Eskimos; Ethnology; Legal Responsibility; *Literature; Oral Expression; Problem Solving; Resource Materials; *Responsibility; *Tribes

ABSTRACT

The United States Attorney General ruled in 1968 that all U.S. citzens 1/4 or more genetic descent of the aboriginal people of North America are, for administrative purposes, titled American Indians even though they may be known as Eskimos or Aleuts. The U.S. recognizes tribal groups as sovereign bodies and conducts business and civil affairs with them accordingly. This paper examines an area in U.S. Law (Codes) that is either unclear or entirely lacking in treating a matter of tribal right to ownership or control of the accumulated literary and intellectual heritage of a tribe and its right to protect its members from exploitation regarding their personal knowledge of tribal cultural heritage. The topic is discussed in light of existing law and custom and several approaches to solving the problem or clarifying the situation are described. In light of the discussion, it is concluded that morally and ethically elements of cultural heritage of the American Indians, Aleuts, and Eskimos that lend themselves to ethnographic research methods and electronic or photographic recording are by virtue of "a priori" right and possession the intellectually created property of the tribes and their members. (Author/NQ)

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ESKIMO AND AMERICAN INDIAN STUDIES CURRICULUM DEVELOPMENT

REGARDING

AMERICAN NATIVE ORAL TRADITION: LEGAL SAFEGUARDS AND PUBLIC DOMAIN

A DISCUSSION

Prepared as an investigation and discussion of an existing problem that bears a direct relationship to the acquisition of resource or source materials necessary for the development of instructional aids and text books for implementation of authentic and relevant bicultural education for American Indian, Eskimo, and Aleut children.

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January 1974

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RC007873

ACKJOWLEDGEMENTS

I wish to thank most sincerely all of those who helped to guide the development of this paper in its effort to cut across disciplines and present some real considerations that concern many different people in many different ways. Most particularly, I want to thank Dr. Louis Rososco; Chair-person, Education Foundations-University of New Mexico, Dr. Sam Deloria, Director-American Indian Law Center; Dr. Deward Walker, Dean-Graduate School University of Colorado; Dr. David Warren, Director-Indian Cultural STudies-Santa Fe; Ms. Elaine Ramos, Vice-president Sheldon Jackson College, Alaska; Ms. Barbara Trigg, Officer-Bering Straits Native Association, and Dean Wendell Wolf-University of Alaska, all of whom encouraged me to look into this subject, and many of whom supplied information and insight to the investigation. To the number of others who helped at the libraries and various institutions or Tribal organizations, my apologies for not acknowledging by name. The confidence in statements made rests from many sources, and for all of these I am deeply grateful.

Laurel L. Bland

AMERICAN NATIVE ORAL TRADITION: LEGAL SAFEGUARDS AND PUBLIC DOMAIN

A DISCUSSION

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ABSTRACT

The United States Attorney General ruled in 1968 that all U.S. Citizens one-quarter or more genetic descent of the aboriginal people of North America are for administrative purposes titled American Indians even though they may be known as Eskimos or Aleuts as well as American Indians. The United States recognizes tribal groups as sovereign bodies and conducts business and civil affairs with them accordingly. This paper undertakes to examine an area in United States Law (Codes) that is either unclear or entirely lacking in treating a matter of tribal right to ownership or control of the accumulated literary and intellectual heritage of a tribe and its right to protect its members from exploitation regarding their personal knowledge of tribal cultural heritage. The topic is discussed in light of existing law and custom and several approaches to solving the problem or clarifying the situation are described.

FOREWORD

Generally, no Native American will "speak" for his people's thinking if he holds the values of his forefathers. Each individual thinks for himself, reaches his own conclusions, and states his opinions as his own. It is a more difficult lesson to learn than to describe. This paper is written from that point of view--it reflects the opinon and judgement of the writer and the comments about law and legal process are those of a layman. This paper is written from the standpoint of an educator turned ethnohistorian in the pursuit of developing instructional materials for American Native and public schools.

A number of highly educated and trained people have become involved in the recording or documenting of American Native cultural heritage. In recent years it has become a growing concern among such people about how to handle the dilemna of performing tasks both Indian people and Science or Education agree need to be done. The cultural heritage of a living people by its name and nature is the property of the group--it is the sum total of the past expression of identity and function that is still alive and functional in the present. In matters of National Trust and National Heritage our Government is explicit on any matters that relate to American citizens since the time of colonialism. Protection is extended (although not always enforced) regarding archeological sites in the United States, but currently questions are being raised in Congress about the final determination of ownership of materials found in such sites if they are on public lands. No where in Federal policy or regulation is the ownership and control of heritage transmitted orally or through ceremony or ritual specifically treated as intellectually created property as is similar material that happens to be recorded in writing or some other form by non-Indian people

Most of us who work with or for American Native people in the effort to document or record the oral traditions are deeply touched by the concern and urgency on the part of the elderly people who wish to safeguard their knowledge and information "so it won't be forgotten or lost." I know of no one who came with an open mind, mature judgment, and a "good heart", who has had the privilige of working closely with Indians, Eskimos, or Aleuts who has not come away enriched within themselves. Many of us also leave disillusioned by absolute contradictions observed in the practice of government policy as it is imposed upon American Native people whereby the result is the opposite of the basic principles we have been taught to regard as the right of every American citizen. We are usually saddened as well as impressed as we observe how the great majority of the older people respect and believe in the principles of freedom and equality as expressed in the Constitution, yet they must struggle continually within the system in order to obtain even some small measure of dignity and freedom for the expression of their own culture and way of life.

Only a few years ago an honored and wise leader (who is as respected as the the shop foreman for the Alaska Department of Highways in Nome as he is among his own people as "an Eskimo man") addressed a group of public officials seeking to institute equal employment opportunity in his state. He spoke of the unique adaptation the Eskimos have made to modern life while managing to retain their cultural capacity to live in accordance with the demands of their natural enviornment. He stated that the Eskimo people must safeguard "their bellies and their dignity" by living in a current dominant society while continuing to guard their ability to survive by remembering the lessons learned in nearly two thousand years of cultural evolution. His words can be added to volumnes spoken by American Native People over nearly 300 years of trying to find an equitable and workable solution to being part of a nation to which they have given their allegiance but not their sovereignty.

In recent years concern, often urgent concern, has precipitated individuals and small groups into actions intended to safeguard the control and community ownership of information and knowledge communicated through legend, ceremony, and traditional forms of story-telling. Well-intentioned and careful actions, usually taken without benefit of legal counsel acting on their behalf, have led people into situations that may not, under law, afford the protection intended. Two examples, as follow, are actual situations, and will illustrate the kind of questions that need to be answered if a tribal group or organization wishes to assure that their title to literary or intellectual creation is valid, and their authority to issue and control copyrights will remain solid.

A group of American Native people, involving five tribal groups, have formed a small non-profit corporation for the purpose of publishing and distributing texts and instructional materials in the Native languages. The materials are published through a public university, and the workshops generating the materials are supported by federal grants. As far as is known, the terms of the grants do not require that printed materials developed through or resulting from the workshops become public property. If this were true, any publisher could print any of the materials in any form for commercial use. Thus, the small corporation of private individuals presently hold title and copyright for source materials and any publications. Questions that arise, however, are:

Since the incorporators, like the workshops, are likely to function as a unit for only a few more years, what happens to the titles to literary properties or the corporate copyrights if and when the corporation dissolves? The workshops and the corporation are not affiliated with or sponsored by any tribe, but they are sponsored by the university--and therefore the state. Who will assume responsibility for the accumulated properties and copyrights? If this is not resolved at time of dissolution of the corporation, will the materials become public domain immediately, or remain legally unobtainable for a period of years when they automatically revert to the general public?

> One of the Western Indian reservations has developed with great careful effort a community school nearly fulfilling the ideal of an Indian school for Indian children that is academically sound, culturally relevant, and under Indian supervision and control. It is a public school, part of the state system, and the boundaries of the school district are entirely within the borders of the reservation. This school district not only develops its own texts and instructional materials relating to their tribal affiliations, but it additionally is engaged in a cultural heritage preservation program drawing upon the knowledge and wisdom of the few remaining elders. Present plans call for materials to be copyrighted in the name of the district. According to informed sources responsible for documenting cultural heritage, presently no arrangement has been made for determining the difference between copyright and title to materials collected in reproduceable form. It was also stated that considerable information from the elders has been forthcoming upon the premise that it would not become available to the general public without appropriate authorization from the Tribe. Questions that need to be answered by competent legal authority are, if copyrights are held by the school district, does this in fact extend copyright to the state, since it is the higher authority covering all school districts of that state; who has the right to authorize copyright to any entity; and how can the Tribe control reproduction and distribution of materials it considers confidential or privileged unto itself. (F 35)

For nearly 200 years American Native People have continued to attempt to sustain themselves within their own sense of identity yet at the same time remain within the laws of the nation with whom they have executed treaties or entrusted their future to the wisdom of its Congress. In pursuing ordinary tribal life they are safeguarded in general terms by the civil and human rights guaranteed by United States laws, but only so far as its effects individuals. Application or interpretation of the Constitution as it may relate to the special class of people known as American Indians and their rights and freedoms as a group is not specific or clear.

There is ample evidence by documentation at all levels and of all types that Eskimos, Aleuts, and American Indians regard their cultures

as viable, real, and functioning, and as satisfactory and efficient a basis for a societal group amid the plural society of the United States as any other special societal view held within this system. They only point out, each in their own way, that American Native cultures are unique in that they were the original ways of life on this land, and they were and are functional. History and current evaluations indicate that these ways of life--like a written way as reflected in the Constitution--are broad, flexible, and serve as guidelines for their followers that enable them to retain stability through time as they adapt and cope with the same changes found throughout the world. Should not these societies, as sovereign entities, also have protection under United States law or policy that guarantees them rights to privacy and freedom from exploitation in relation to their common or communal heritage in the preservation of their oral traditions or literature, music, dance, and art?

OPERATIONAL DEFINITIONS

Most terms used herein have no special meaning beyond those found in any standard dictionary. Occasionally it is necessary to use a term in its specialized meaning. These appear below with the definition as it is meant to convey a concept or construct in anthropological or legal context.

American Native: Any person of aboriginal North American descent who declares himself to be of aboriginal descent, who is genetically one-fourth or more aboriginal descent and acknowledges same, or who is enrolled or registered with the Bureau of Indian Affairs as one of aboriginal descent.

American Indian: 1) those of tribal affiliation commonly called "Indian" as opposed to those who call themselves Eskimos or Aleuts, and
2) contextually synonymous with Indian.

Culture: The integrated pattern of human behavior that includes throught, speech, action, and artifacts and depends upon man's capacity for learning and transmitting knowledge to succeeding generations, and includes the customary beliefs, social forms, and material traits of an integrated society.

Cultural Heritage: The integrated accumulation of belief, social forms, material traits, and customary speech patterns and behavior traits as reflected in legends, myths, stories, music, song, dance, ritual, ceremony, and graphic arts, seen as an endowment.

Ethnographic: (adj.) As used herein, is nearly synonymous with terms associated with cultural anthropology, like ethnographic research associated with preservation of cultural heritage draws upon the methods, concepts, and data of archaeology, ethnology, ethnography, folklore, linguistics, and occasionally those of sociology and psychology.

Indian: Used herein in the legal definition according to a recent ruling of the Federal Solicitor, i.e. to describe anyone who is one-fourth or more genetic descent of North American aboriginal origin.

Patrimony, National: An endowment or estate that has descended in the same nation since its founding, similar in meaning to cultural heritage, except the inheritance is tied to conditions of nationality and social

or material forms seen to be typical of that nationality.

Patrimony, Tribal: Used herein as synonymous with cultural heritage--an endowment descended to a strait line of recipients identified by themselves and the surrounding or dominant society as Indian, Eskimo, or Aleut tribes, bands, villages, or communities.

Oral literature: Any oral expression of events, values, or beliefs whether real or imagined expressed in traditional or customary style and form with origins in a preliterate society that remain in use and are not recorded in writing or other reproduceable media.

Oral tradition: Refers to a society using the means of verbal or oral transmission of cultural values and beliefs instead of symbolic recordings like writing. It is also used synonymously with oral literature, but may be a broader term in this application including all forms of artistic and verbal communication other than graphic arts. Depending upon useage, oral literature may also include songs.

Legal terms used are as defined in Black's Law Dictionary. For ease of reference, the principal terms used herein are listed below.

Control: Power of authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee.

Copyright: The right of literary property as recognized and sanctioned by positive law. An intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested, for a limited period, with the sole and exclusive privilege of multiplying those copies of the same and publishing and selling them.

(Note: International copyright is the right of a subject of one country to protection against the republication in another country of a work which he originally published in his own country.)

Heritage: In the civil law. Every species of immovable which can be the subject of property; . . ., in whatever mode they may have been acquired, either by descent or purchase.

Inheritance: (after Coke as the term hereditaments) Things capable of being inherited, be it corporeal or incorporeal, real, personal, or mixed, . . . / incorporeal hereditaments: Anything, the subject of property, which may be inherited. . . . .

Ownership: Collection of rights to use and enjoy property, including right to transmit it to others. / The complete dominion, title, or proprietary right in a thing or claim. The entirety of the powers of use and disposal allowed by law.

Right: (n) . . . , an interest or title in an object of property; a just and legal claim to hold, use, or enjoy it, or to convey or donate it, as he may please. / The term "right" in civil society, is defined to mean that which a man is entitled to have, or to do, or to receive from others within the limits prescribed by law. / Rights as defined with respect to the constitution of civil society . . . are such as belong to every citizen of the state or country, or in a wider sense, to all its inhabitants, and are not connected with the organization or administration of government. They include the rights of property, etc. . . .

Title: (syn. legal title) One cognizable or enforceable in a court of law, or one which is complete and perfect so far as regards the apparent right of ownership and possession, but which carries no beneficial interest in the property, another person being equitably entitled therto; in either case, the antithesis of "equitable title."

Examples of application of terms for purposes of clarification and definition:

Documentation of oral tradition or literature: PEOPLE OF KAUWERAK: LEGENDS OF THE NORTHERN ESKIMOS by William Oquilluk assisted by Laurel L. Bland is an authentic reproduction in English of ancient stories and beliefs and modern tribal history. This is the type of material seen to be properly subject to ownership by tribal authority. NOBODY LOVES A DRUNKEN INDIAN by Vine Deloria is a work of fiction about Indians and would not be subject to tribal ownership or control.

Records sold nationally containing the music of the Eskimos of St. Lawrence Island, Alaska would be subject to tribal ownership, but "Half-breed", a song popularized by Cher Bonner, like NOBODY LOVES A DRUNKEN INDIAN, would not be for the same reason.

William Oquilluk's material and the recording of Eskimo music are actual reproductions of oral literature or artistic expression.

INTRODUCTION

An American Indian (Eskimo or Aleut) tribal authority pays an elderly member an honorarium of $10 per hour to record on tape in English or the Native tongue stories and legends of their people to be used on a local educational radio station. The tapes now exist. They do not "belong" to anyone--that is, no one has title to the content. The information on the tapes has been passed down through centuries of time by the preceding generations and the elder has memorized them accurately. But, they do not belong to her or her family, either. They are the "stories of our people" in the view of the Indian community. Now, a state-wide educational radio network would like to copy the tapes and circulate them. Who can authorize this? Who owns them--that is, their content? Who can authorize copyright application? Who should hold the copyright?

An older man sends to an ethnohistorian friend tapes of fifty years history of his tribal group as he has observed it. He gives his personal experiences as well as those of others. He illustrates some of the historical information with the legends and beliefs of his people. He says he does this so younger generations and other people can know about his way of life. He does not wish to commercialize on what he has done out of altruism, yet he does not feel it is right for individuals, institutions, or private business to reproduce this information if it appears that it is a profitable commercial venture. Who owns the title to his information? Who should hold the copyright? Who should authorize reproduction and distribution of the information?

In the course of scholarly pursuits, an anthropologist is led by American Native people to abandoned buildings once used by them (and government) that contain documents and records in a deteriorated state that clearly indicates they will soon disappear or be destroyed. The papers contain invaluable information not previously a matter of record dealing with tribal geneologies, past

village or tribal business, or health, education, or welfare records about Native people past and present. These materials are found on tribal or public lands and due to circumstances are not seen to be under the guardianship or safekeeping of anyone. In view of their social and historical value, the papers are collected and placed for safekeeping in a public repository in the name of the local tribal authority. Some of the information in the documents is obviously of a confidential nature since it relates to living people. Who is the authority responsible for the care, safekeeping, and use of such materials? Who can authorize the proper use of the papers? Who can authorize reproduction or copying of the materials for civil, scholarly, or commercial purposes? Who should control such copyrights? Who is authorized to enter into agreements with government and institutions regarding the care and handling of such materials?

An elderly American Native spends many years noting in a diary or a notebook the history and traditions of his people. The material is subsequently turned over to a professional writer to be transformed into a publishable manuscript. The author is clearly the American Native, yet he lacks the skill to convert his work to a printable form and he is motivated to print his literary effort by his obligation to preserve and pass along to younger generations the accumulated knowledge and beliefs of his people's past. Even when the original material is converted to a publishable form, the author lacks the education and experience to enter into the kinds of formal agreements necessary to transform the manuscript into a printed work. He may logically turn to his tribal authority, but there are no precedents, guidelines, or regulations to guide either the author or the organization. Questions that arise involve some considerations not clear under United States Law. Can his writing that is the record of the past of many subdivisions of his tribe as told by generations of elderly people before him be the communal property of the group? Can the group hold title? Both the

tribal group and the author feel he does not own the stories told as literary property. He was obligated to make sure the information was not forgotten because it is the duty of certain individuals in a tribe like himself to pass along such information to younger generations. He merely chose to write his portion of information down instead of relying on oral communication. How can the rightful ownership be established? How can the distribution of this knowledge be controlled so that which is public may be used to the benefit of the public; and that which is private to the tribe, remain private? Who can authorize publication on behalf of the tribe and/or the individual?

A modern manuscript is compiled in good faith by a trained writer or agent of an institution (as a personal voluntary effort) and an Indian using the Indian's information and artistry and the professional's expertise. The finished product is professionally evaluated as publishable, commercial, and useful for educational purposes. The Indian lacks interest, education, and experience in the world of writing and publishing, yet he has the natural feelings of pride and possession in the finished manuscript. He says, "I did it so our children who don't live here know what our life is like, and so other people will better understand how we live. We are partners, we wrote it together. You take care of it." What does the professional do? He has used knowledge and information that is both communal and private, and some that is known to be regarded as common heritage of the tribal group. By established practice, the title of the work can vest in either one or both of the authors. Who can protect the rights and interest of the Indian partner? Who should authorize the reproduction, distribution, and sale of the document under these circumstances? Who should profit if a profit is made? The document was created to meet a need--educational or scholarly on the part of the professional, preservation of heritage and tradition on the part of the Indian. Neither party desire to own the literary property, viewing it as properly the property of the tribal community, yet each has an interest in

the investment of time, talent, and actual cost of manuscript development. Who should rightfully assume title? Who should assume the responsiblity for authorizing copyrights? Who should mediate between the group who views the content of the document as common knowledge and heritage, and the one or more individuals who have for the first time documented or recorded that knowledge in some form readily reproduceable and often associated with immediate or potential commercial applications?

These are but a few actual examples of the problems extant regarding recording and documentation of cultural heritage and tradition of American Native People using living people as sources of information, or the diaries or writings of living or recently deceased people. Such information is not usually regarded by the person passing it along with the personally possessive attitude common to Caucasian or European storytellers or writers. The American Native is ordinarily most concerned with the content--its authenticity and clarity -and the need for the information to survive for whatever benefit it may bring to future generations. Even before the creation of the Constitution, some of the Colonies like Massachusetts (6) passed laws to protect the writings and intellectual creations of its citizens. The Constitution is the basis for current Copyright Law. This U.S. Code, Title 17, is specific on title and ownership for individuals (or corporations) regarding literary and artistic creations. It also is clear on the point that legends, songs, stories, and other creations that have their origins particularly in English history and prehistory are not to be copyrighted by individuals--although certain arrangements or interpretations of them may be. This is logical, since these can be viewed as the common heritage of the founders of this nation. What Title 17 and other Codes do not do is make provision for literary, artistic, or other intellectual creations that are the common or communal heritage of sovereign bodies residing within the borders of the United States and legally recognized by the Federal Government as sovereignties.

A sovereign body under Common or International Law is usually regarded as having the right and obligation to protect the properties of itself and its members in any areas where it has not expressly forfieted this power. According to the Albuquerque Office of the U.S. Attorney General and others practicing law (F-30) none of the Treaties or other agreements between the Federal Government and American Native People have forfieted tribal ownership and control of their literary or artistic creations in either verbal or any form of recording. The primary question becomes:

> If the literary tradition of American Native People was preserved and transmitted orally, or symbolicly through ceremony and ritual because the technology or customs of the owners precluded it being recorded symbolicly in writing or with electronic or filming devices, does this mean that these creations are no longer their communal or private property when other sovereign bodies (or their members) can duplicate the information or its expression and carry it away with or without the permission of the people involved, to subsequently take ownership and title to those duplications or recordings?

The following pages will examine this question.

AMERICAN NATIVE ORAL TRADITION: LEGAL SAFEGUARDS AND PUBLIC DOMAIN

A DISCUSSION

> "Cestuy, que doit interiter al pere, doit inheriter al fils: He who should inherit from the father, should inherit from the son, 'Though the law excludes the father from inheriting, yet it substitutes and directs the descent as it should have been had the father inherited." (2 Bl. Comm. 239)

Since the foreign nations settling in North America viewed themselves as conquerors, settlers, or legally established traders of a virgin uncivilized land, they saw no cause to include in their governing and regulating laws means of dealing with communal entities who were (in their eyes) neither sovereignties, corporations, or companies nor divisions of a government. Thus, no clear-cut law, regulation, nor policy exists in United States Codes whereby communal interest in certain types of non-real (intangible) property is treated and protected from appropriation by others outside that community for their own benefit or profit. Most specifically, the aboriginal people of North America--Indians, Eskimos, and Aleuts were made wards of the Crown or Federal Government early in the settling of the land. As time changed circumstances a gradual pattern emerged to the present when virtually all Indians, Eskimos, and Aleuts who are citizens of the United States enjoy the same equality under law regarding real property as any other citizen. Although this equality has been granted to them severally as well through tribal sovereignty, reservation government, and regional corporations (together with a host of sub-divisions under law), it appears that within the body of U.S. law there is no expressed means of protecting the intangible assets held in common by a tribe or tribal sub-group. These assets refer to the creations of human intellect over hundreds, and sometimes thousands of years. The body of knowledge, wisdom, beliefs, myths, folklore, ceremonials, and rituals that a group holds as a common heritage (refered to herein as oral tradition or cultural heritage) is commonly referred to by

anthropologists as ethnology of a people or the two terms mentioned parenthetically.

United States Civil Law (Codes) and its ancestor, British Common Law deal with two basic concepts of justice. One, it specifies and protects the rights and property of the individual, and secondly, it specifies and protects the rights and property of the nation and divisions of nation like state, county, borough, city, township, and municipality. Modern law goes one step farther and equally protects the rights and property of a legal entity regarded as an individual, the corporation. In general terms, then, U.S. civil law throughout the court system has a dual obligation, i.e. to provide justice and protection for the individual, yet treat fairly the needs of the whole society and its subdivisions through exercise of eminent (or public) domain. Except by particular Acts of Congress and the ever changing policies of the U.S. Department of the Interior, Federal law does not deal with one other recognized division of our nation; the Tribes and their subdivisions, to the same extent as it does all others.

The process of law is dynamic and ever changing, albiet it slow and fine grinding as it moves to meet the changing needs and mores of the society it serves and protects. A contradiction or a haitus exists in Federal Statutes regarding tribal rights and authority. The Federal Government extends to the tribes power over their members and their lands greater than that given to individual states, yet it does not explicitly extend to them right, title, control, or even ownership of their cultural heritage. The purpose of this paper is to focus upon and to discuss this condition and to suggest possible actions to remedy the matter.

When the British, French, Spanish, and Russians settled in North America they brought the respective legal systems with them as they had evolved from Hammurabi, the Romans, and the Catholic Church. Later, as the nations

of Canada, the United States, and Mexico came into being each established its own body of codified law. All these laws have one thing in common. They seek to establish a just and fair system for the individual to deal with his government, and for the government to govern and deal with the individual. For collective bodies, the individual can deal with divisions of government or the corproation, and conversely, government can deal with its divisions, corporations, or individuals. But, each of these are treated in the eyes of the law as if they actually are an individual. The United States Government does deal with the Tribes in this individualistic manner regarding courts of Indian Offenses on Indian reservations, contractual arrangements for Federal programs, and similar matters. Only by inference in departmental policy or in political rhetoric does the Federal Government recognize ownership of cultural heritage by the Tribes.

> "But there can be no question that the government and the people of the United States have a responsiblity to the Indians. In our efforts to meet that responsiblity, we must pledge to respect fully the dignity and the uniqueness of the Indian citizen.
> That means partnership--not paternalism.
> We must affirm their right to freedom of choice and self-determination.
> We must affirm the right of the first Americans to remain Indians while exercising their rights as Americans.
> We must seek new ways to provide Federal assistance to Indians--with new emphasis on Indian self-help and with respect to Indian culture." President Lyndon B. Johnson, 1968

> "We must recognize that American society can allow many different cultures to flourish in harmony and we must provide an opportunity for those Indians wishing to do so to lead a useful and prosperous life in an Indian environment.
> "Termination of tribal recognition will not be a policy objective and in no case will it be imposed without Indian consent." Richard Nixon - Preelection statement, 1968

It is commonly agreed in the courts and among the public that man and science have a reciprocal obligation. The pursuit of knowledge for the sake of understanding man and his universe is looked upon as a valued endeavor. At the same time, the commercialization of knowledge gained

through science, if it is seen to be presently or ultimately harmful to man is usually prohibited by law. The most recent examples of this are stricter laws governing experimentation on human subjects and the growing list of laws and regulations dealing with environmental pollution. In this paper the question of what is just and humane in relation to the pursuit of knowledge through science or technology arises, but in this instance it is centered upon the Behavioral Sciences--or research within certain disciplines of the Humanities. As will be seen later, the issue becomes more complex due to the urgency of time and the need to document and preserve knowledge and information while it is yet extant in authentic and reliable form. Additionally, the matter is compounded by the desire of Indians and Eskimos to record and document their past and their heritage from their own point of view. This has been stated frequently by their leaders in recent years. (R 1, 2, & 3) The problem may be stated as follows:

1. An immeasurable but vast amount of information and knowledge embodied in oral tradition that can add invaluably to the body of knowledge about man and his adaptation to his enviornment since ancient times in America is still available, but as yet unrecorded and largely unkown. This is the prehistory and early history of the aboriginal Americans.

2. By its nature the customary structure through which Oral Tradition is transmitted means that in modern times some is lost with each succeeding generation. Native Americans and anthropologists agree accurate rendition may end with this present generation of elders.

3. Tribal elders and teachers have gladly shared their knowledge and wisdom in the past, and today are willing to see it preserved for the benefit of future generations. Yet, a long history of exploitation inhibits some elders who now safeguard oral transmission of tribal heritage.

4. Thousands of competent and dedicated scholars (archeologists, anthropologists, historians, ethnographers, authors, etc.) in the past and present have contributed to the body of knowledge about American prehistory. Usually their findings, both real and intangible become either their personal property or that of a public or private institution. Only in very recent years has some of this knowledge been documented and released through the auspices and copyright of a tribal governing body or tribal owned corporation, while the original information remains within the ownership or control of the Tribe. (R 9).

5. Since the passage of the Alaska Native Claims Act in 1970 it appears that no American Indian or Eskimo tribal or territorial group is without a legally established entity to serve in their interests in matters of tribal property both real and intangible.

6. United States law regarding creations of human intellect of its citizens predates the Constitution, since the colonies enacted copyright laws early in their history. With the founding of the United States, recognition of individual right to intellectual creations was stated in Article I, Sec. 8 of the Constitution: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". At that time government, its subdivisions, companies, or corporations were treated under law as individuals. The question of Tribes or similar special political classes of people that the Constitution might affect in the future did not exist. Thus, there was no need seen to treat intellectual creations viewed as communal property or cultural heritage in the manner of aboriginal thinking as a separate or special category of "Science and useful Arts".

7. In recent times understanding and appreciation of the value of American Native cultural heritage and oral tradition has been manifested by scientists, scholars, Indian and Eskimo people, and the informed public. Indians, Eskimos, scholars, and institutions now share different aspects of the same quandry. With appreciation came a dilemna, for the questions of ownership, ethics, and distribution, marketing, or sharing of knowledge are now matters of real concern. Much oral tradition or cultural heritage involves religious beliefs, ritual, and ceremony. Some of this is still regarded to be of secret and sacred nature. Oral tradition is a weaving together of folklore, myth, belief, and stories of actual events and people expressed in set customary ways through song, dance, storytelling, and artistic creation. Since these intellectual expressions of cultural heritage have been passed along unchanged for generations it appears that they may legitimately be viewed by Tribe, Government, and institutions as tribal property. It should be immaterial to this fact whether or not only certain persons within the tribe are viewed by the tribe as having the right to express a particular artistic or intellectual concept. Antiquity of origin is not necessarily a criteria for determining tribal ownership of intellectual or artistic expression of cultural heritage, but rather the traditional nature of form, expression, and content. Oral tradition, sometimes refered to by linguists as oral literature, is true literary property because it exists. It can be compared to the traditions and literature of the Catholic Church or the Masons that was once oral but is now documented and considered the property of those institutions. Until the Federal Government clarifies the definition and legal status of oral tradition owned by American Tribes

as literary and artistic properties the assumption that Constitutional safeguards are fully extended to Indian people is questionable.

8. The Copyright Law of the United States protects authors and writers. It does not protect what science calls "informants", whose knowledge and information may form the basis for scholarly volumes or popular writings composed almost entirely of direct quotation or translation of oral tradition of Tribes. The Antiquities Act (Public Law No. 209) protects archeological sites and artifacts in the public interest. It deals most specifically with sites and materials found on public lands. These are in theory tangible items, but in practice the anthropologist or archeologist often includes in his report of work on Indian lands verbatim recordings of oral tradition as it relates to the sites or the artifacts. Records and materials are commonly viewed as the property of the institution sponsoring scholarly research or the Federal Government. At the present time, Government policy is to view sites and artifacts as public trust materials and so designate that they will either be federally protected "in situ" or placed in public or private institutions for public benefit, although there are a few exceptions similar to the example cited on page 19 . The Antiquities Act does not define or treat oral tradition specifically, although by the nature of the subject of the Act it could properly do so. It would seem logical that records and documents within tribal areas of archival nature of questionable or ill-defined ownership should be treated as Tribal Antiquities and be subject to Tribal jurisdiction or control.

9. The passage of the Alaska Native Claims Act together with the growing sophistication of American Indians has contributed to alterations in practice of policy within the Department of Interior . It is not

permissible to conduct archeological research on Indian lands without the written consent of Tribal authority. In Alaska, at least, written permission is required to conduct such research on sites associated with tribal groups even through the land itself is not subject to tribal jurisdiction. It has become customary in these cases for permission to be contingent upon agreement to return all artifacts to the tribal group along with a complete report of the research. According to information received from the U.S. Department of the Interior, proposed revisions to the Antiquities Permit are now being reviewed in Congressional committee. These revisions would require that artifacts and tangible ethnographic materials associated with archeological investigation of Indian and Eskimo sites would remain the property of the tribal authority. At this time it does not appear that documents or records are included in the proposed revisions. Since the Act deals primarily with tangible evidence recovered, it seems that information transmitted orally or recorded electronically or on film is not yet included in items to be covered by the Act.

10. Presently neither the Copyright Law nor the Antiquities Act recognize or acknowledge the existance of American Native orally transmitted literature, music, song, dance, or invention. Since these properties are presently being documented and recorded and the process can be expected to continue for some time the rights of ownership, title, and control need to be settled. Indian and Eskimo people as well as scientists, scholars, and institutions are inhibited from performing the needed and urgent task to preserve these elements of cultural heritage while there is yet time because these legal questions have not been answered. The questions of tribal right, informant's right, and public domain remain untreated and unresolved by extant U.S. Codes, policies, and regulations.

"Citizens are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights." Waite, U.V. v. Cruikshank, 92 U.S. 542

The discussion presented herein is intended to be constructive and positive. It deals with the present and predictable future conditons as they relate to a class of United States citizens called Indians by the Federal Government. It does not concern what is past, nor does it presume to suggest altering the past through any form of retroactive policy or law.

In the coming fifteen to twenty years it is possible to document and record--and thereby preserve--a treasury of Indian and Eskimo cultural heritage as yet untapped and little known to science. The documenting of oral tradition in its many forms is an old and honored scholarly pursuit. It has its roots in the first scribes who wrote down the words and songs of cultural groups known today under the titles Old Testatment, the Song of Beowulf, the Vedis of India and others. To preserve the integrity and quality of recording and documenting today when the majority of people are literate but few are skilled in epistomology requires the knowledge and skill of a team. The preservation of oral tradition, if it is to be worthwhile and useful must be done cooperatively with those who know the expressions of tradition, those who are its guardians or owners, and those who are trained and skilled in the techniques required to preserve it in its most valid and accurate form.

The scholar normally does his task solely to preserve old knowledge or to add anew to man's understanding and appreciation of his past and present social and natural enviornments. Indians and Eskimos who wish to preserve their traditions do so for cultural and emotional reasons, although they may share the scholar's views. For practical reasons Government and institutions commonly serve as repositories for information that has been

collected to date. The cost involved in scientific or scholarly inquiry and the value placed upon the resources gathered and findings recorded demand that such materials be placed in adequate vaults or places of safekeeping like libraries and museums. It is customary for the institution or agency sponsoring scientific investigation or ethnographic research to view the records and materials collected with a proprietory feeling. Thus, institutions, Government, and individuals do possess the major portions of oral tradition recorded to date.

These past and current practices are not often viewed in the same way by Indians and Eskimos of the United States. While it may be accepted that safekeeping of materials in appropriate repositories is wise, the subsequent treatment of those materials as if they no longer related to the people from whence they came is not acceptable. As mentioned previously, within the Tribe certain stories, songs, dances, artistic expressions, and ceremonies may only be repeated or used by certain persons. They are regarded by others in the culture as "owning" them through inheritance, gift, religious vocation, or original creation. Other items of this same classification may be used or expressed by anyone of the tribal group who is recognized as being able to repeat them correctly in proper traditional form. This latter is most often the case when death has taken those who would have been the owners of the knowledge, and another has stored this in his/her memory. It should also be noted that although many subdivisions of a large cultural group may know the songs, dances, ceremonies, or stories of each other, rarely if ever will one group repeat these things if they are regarded as the property of another group. Regardless of how oral tradition is viewed within the cultural group, this body of accumulated knowledge, belief, custom, and values is regarded by the tribe and other Indian groups as tribal community property of each specific Tribe.

Scholars are interested in oral tradition and cultural heritage for

the same reasons tribal groups feel possessive about it. That is, within the body of communication is woven the essence and identity of the cultural group and all of its social evolution, history, and functional dynamics. Because this is true, and the fact that much of oral tradition deals with a vanished way of life, Indians and Eskimos have stated that the safeguarding and retention of this knowledge adequately protected from non-Indian ownership or commercialization is in the nature of a sacred trust.

Virtually every ethnologist or archeologist working with or among Indians or Eskimos have not only been enriched personally, but they are also deeply impressed with the generous sharing of information and patient instruction to aid them in understanding the people and their past that is the subject of their professional interest. In recent years, however, ethnographic research is increasingly confronted with a dilemna. Many Indians and Eskimos (well qualified and often professionally trained) as well as non-Indian ethnographers find that the guardians of tribal heritage--particularly elders who hold knowledge of ceremony and ritual--are hesitant to have their knowledge documented. Although not common, this is sometimes expressed "it is better our past should die and be forgotten if it is going to beling to the Whiteman and be kept in his libraries and museums". It should be acknowledged that certain rituals and ceremonies, most particularly among the Southwest tribes, are religious in nature, and these have been transmitted through established practices still functioning today. There seems to be agreement among Indian people that this knowledge is not in danger of being lost. The position being stated herein applies to secret or privileged information only in the sense of future possibility when a Tribe may desire documentation for its own purposes. Primarily, this paper deals with information properly classed as historical describing tribal evolution and events in legendary

or factual recounting. Clarification of tribal rights and ownership for future actions related to the preservation of Indian cultural heritage regardless of who may be engaged in doing so cannot only facilitate that preservation, but it will also preclude much unnecessary misunderstanding among all concerned. (F 35)

> "The Constitution is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." (Ex parte Milligan, 4 Wall. 2)

It may be said that this paper deals with three "classes of men"--Indian Tribes, scholars and scientists, and the public at large. Within the cultural heritage of the Tribes there is knowledge and information that is of interest to the public at large since it may enrich their intellectual enjoyments and bring new knowledge about human social evolution. Scholars and scientists have a special interest related to their professions. Indian Tribes function today upon the cumulative foundation of their cultural heritage. In accordance with the precepts of anthropology, the equilibrium of a culture depends heavily upon the viability of its heritage. The studying of a culture for the purpose of understanding its life-giving or mortality inducing qualities may be socially approved, but the methods, procedures, and application of results of study should be subject to the control of the studied. Ethnographic information about a culture is parallel to the life-history of an individual, and in the same way may be used to the benefit or the harm of the subject. In either case it is essential under principles of the Constitution that individuals or classes have certain rights to privacy as regards public disclosure. In this sense, the Tribes constitute a "special class".

The ethnographer regards oral tradition and its supportive expressions with an equal but dissimilar value than the Indian or Eskimo conveys. Ethnographers seek to document and record with accuracy and in accordance with established standards of quality and quantity knowledge and understandings of something fundamental to men and their evolution as social creatures. Ethnographers may also interpret information gathered, and this is sometimes the cause of misunderstanding among the people they are documenting. The ethnographer is obligated by the ethics of his profession to make a permanent record of his findings so they may be deposited in an appropriate place and made available to those with a real interest. He is not required by ethics, per se to make his findings public, but rather to record in the interest of science. Deposit of findings, extent of dissemination, and application is normally determined by the circumstances associated with the research.

Indians and Eskimos state they regard their remaining oral traditions as a scared trust and the embodiment of the essence of their way of life. They fear the loss of knowledge about these traditions will be brought about through enforced changes of modernization and urbanization. They have made statements and taken action sufficiently in recent years to provide evidence that they feel a need to document and record their cultural heritage(s) through measures within their control. Reasons range from Tribal enrichment and cultural survival to a desire to contribute to knowledge by maintaining their established unique identity in the family of mankind. (R22,27; F27,27,27,31)

The history of ethnographic study in North America is filled with proof of cooperation and support for the recording of cultural heritage. Volume after volume by anthropologists and ethnographers credit long lists of Indians and Eskimos with their "invaluable assistance" in providing ethnographic or scientific details. This includes guidance to sites and places, sketches of maps, charts of events and genealogies, and patient assistance in aiding people who do not speak their language to reproduce to the best of their ability names and special terms phonetically spelled in order to document

protions of local oral tradition. These volumes rarely indicate that the information was made public through cooperation or with the permission of tribal authority.

In recent years two conditions have become apparent and are important considerations for Government and the academic community. One, a growing number of Indian and Eskimo leaders (reflecting the greater sophistication and attainment of higher education levels within the tribes) express publicly that the increasing interest of the public and activities of scientists and scholars in Indian and Eskimo cultural heritage is an invasion of privacy. (R2, F31) Secondly, with the establishment of virtually universal sovereignty among the Tribes (ex. Navahoe Tribal Authority, Pueblo Governors, and regional corporations of Alaskan Natives) events have set precedents in practice that clearly illustrate the need to resolve the problems surrounding ownership and control of future results of documenting cultural heritage for scientific or scholarly purposes regardless of whom the instigating sponsor may be.

Eskimo villages and other Indian communities on or off reservations may legally be open to public visitors, but in practice they are generally regarded by Government, Indians, and Eskimos as private lands of the Indians. For example, one of the portions of the Navahoe Reservation that contains important archeological sites is located at Canyon de Chelly, Arizona. This section of the Reservation is also important to the local economy since it is composed of grazing ground, some gardens, and wild harvest areas. By contract with the Federal Government, the first (and to date only) visitor center on Indian lands was constructed by the National Parks and is operated and administered in accordance with an agreement between the Navahoe Tribe and the U.S. Department of the Interior. According to Dr. Zorro Bradley, Deputy Director of National Parks, since the establishment of Canyon de Chelly National Monument all artifacts uncovered or ethnographic materials compiled there remain under the control and safekeeping of the Tribe. (F31)

As examples of the exercise of ownership and control practices now in use the following are given:

A number of books for public or educational purposes containing oral tradition in part are published by the Zuni Tribe. The copyright is vested in the Governors, even through a number of Indian "informants", scholars and scientists (who may or may not be of Indian descent) and institutions of higher learning may have been involved. The development of the manuscripts was associated with the Cultural Studies Research and Resource Materials Development Section of the American Indian Arts Institute operated by the Bureau of Indian Affairs, United States Department of the Interior. Since public money was used to produce the materials, yet copyright vests in the Zuni Governors, this may be seen as a precedent for Government acknowledging Tribal ownership and control of documented or recorded Tribal Heritage.

In Alaska the "Special Historical and Cultural Inventory of Imuruk Basin and Adjacent Areas" (funded by private, state, and federal monies) was initiated under a letter of agreement between the regional representative body of the time (the Arctic Native Brotherhood) whereby all ethnographic materials, documents, or records accumulated directly by the project are to be owned or placed in the safekeeping and control of that body or its designates. The agreement further specified that resources compiled would be placed in a public repository for safekeeping, but under the guardianship of the regional tribal authority. After passage of the Alaska Native Claims Act, materials developed or located that properly were within the jurisdiction of other Alaskan Native Tribal Regions were deposited under the guardianship of the appropriate Regions. (F31)

Most recently, a University of New Mexico graduate student was required to execute a similar agreement with still another Regional Corporation in Alaska prior to beginning a study of kinship systems among Alaskan Athabascan Indians. (F31)

These foregoing examples represent a few of the steps that have already been taken in some areas whereby Indians and Eskimos have found ways to protect their sense of ownership for oral tradition and other elements of cultural heritage while concurrently obtaining needed records and documentation of their past. In some instances there may be a question as to the legality of their position. This can only be established through Federal action at Departmental or Congressional level prior to testing in the courts, or through a series of court actions on a case by case basis until accumulated precedent has the effect of a Federal Statute.

> "The Constitution is a restraint upon government, purposely provided and declared upon consideration of all the consequences of which it prohibits and permits, making the restraint upon government the rights of the governed. And this careful adjustment of power and rights makes the Constitution what it was intended to be and is, a real charter of liberty receiving and deserving the praise that has been given it as 'the most wonderful work ever struck off at any given time by the brain and purpose of man'." (McKenna, Block v. Hirsh, 256 U.S. 135)

What are the obligations of science, government, and citizens regarding search for and recording of information and knowledge about Indian cultural heritage? Where can the line be drawn between National Patrimony and Indian Tribal Patrimony? At what point does Indian Tribal Patrimony become incorporated into the National Patrimony? These are complex questions beyond the the scope of this paper, but they can be examined in general terms as they relate to oral tradition. Oral tradition recorded under ethnographic controls constitutes a record of patrimony. The ethical right to control this heritage needs to be determined, and Tribal Patrimony merging into National Patrimony is not a simple matter of some point in time. Portions of oral tradition of most tribes predate modern tribal divisions. Another major portion of oral tradition postdates the founding of the United States. The most ac-

ceptable solution would appear to be to regard all oral expressions presented in traditional style and form of storytelling, music and dance or similar artistic expression (sand painting or products of the storyteller's knife, for example) as categorically items of oral tradition or cultural heritage. Also to be included under definitive classification would be such items as recounting of genealogies and events internal and external to the Tribe.

Ideally, science seeks knowledge and understanding for the benefit of man and his societies. Ideally, government supports and aids science and scholarly endeavor for the same reason, but it also sees that science is humane in its practices and mechanics and guards the rights and privacy of individuals and groups so that only with their full knowledge and consent do ordiary citizens participate in the tasks assocaited with science where they may be a vital portion of the ingredients of scientific task. Ideally, citizens appreciate the expertise of the scholars and scientists and seek their aid when they require their special skills and knowledge in order to solve a problem or accomplish a task. In practice, however, expediency, practicality, and basic misunderstandings often lead to less than the ideal regardless of how the individuals involved may feel.

Some tribes, like the Navaho have tribal historians and have attempted to institute a practice of requiring ethnographic research permits from those who desire to work in the realm of documenting oral tradition. In Alaska a similar practice is found among several regional corporations, the equivalent to tribal administrative bodies on reservations. Since these are initially the outcome of local efforts to safeguard the interests of tribe, informant, and scholar or scientist, they have no real enforcement qualifications. Clarification at the Federal level with a forthright statement regarding ownership and control of such materials seems to be the only solid foundation for developing a workable means to accomplish the ends of both science and Indian tribes who wish to document or record their cultural heritage.

In the matter of documenting and preserving oral tradition the historic policy and procedure have culminated in a condition that threatens to deprive Indian and Eskimo people and the public of a major and unique portion of National Heritage as well as depriving Indian and Eskimo descendents of vital parts of their specific Tribal Heritage.

It is now a matter of establishing "the rights of the governed" as a special class of citizens as it relates to the interests of science in the broad sense, and to the rights of sovereignty of Tribes and their members in the specific. In this way the Tribal jurisdiction and authority in matters of cultural heritage preservation for some 680,000 U.S. citizens under tribal or regional corporate administration may be defined and supported by the Federal Government according to Constitutional provision and pertinent interpretations.

> "Ignoratis facti excusat--Ignoratia juris non excusat. Ignorance of fact excuses--ignorance of the law does not excuse". (Gr. and Rud. of Law, 140)

For the purpose of this discussion it is presumed that the scientist or scholar practices his skill in the interest of his discipline and its ethics; and the Indian or Eskimo who aids him by providing information does so in order to preserve his knowledge for later generations and in the public interest. This collaboration always results in a voluminous collection of notes, data, and information collected by the professional. These are commonly called raw resources or resource material. These will later be processed into some kind of report, text, or deposited in an institution or the files of the professional.

A second separate and distinct kind of intellectual or artistic or literary property may result as a part of this process. One or two Indian or Eskimo informants may be particularly endowned with creative or retentive ability. This ability may be so extensive that one individual can verbally

or graphically compile a complete text, or the basis of a complete text on a significant portion of the oral tradition of his cultural group. He may have the capacity to recreate long spans of history of his culture through personal experience and the experience of others within his knowledge from previous generations that is valuable ethnographic or historical resource material (description of cultural heritage components), yet may not properly be classified as ethnographic resource information within the limitations of the research or task currently at hand. Whether the individual is literate or not, the usual condition is that he/she does not have the skill, time, or opportunity to set forth in writing or other media the information held in such a way it is acceptable for publication or reproduction. Many times the professional becomes the recipient of such materials. Lacking guidelines or precedents, the professional usually includes these materials in the total resource material deposited with the organization or institution sponsoring the ethnographic research, or puts it among the miscellaney of excess materials that normally accrue in a research effort and presently legitimately become the property of the professional as part of his "field notes". Ultimately such resources may be published or otherwise reproduced under the copyright of an individual or institution giving proper credit to the source, but without further consideration for the source individually or collectively. From this practice has stemmed much misunderstanding between Indians, Eskimos, and the academic community. Nowhere along the line has any law been violated, but reactions of all concerned are a feeling of being "wronged" by others involved in the situation. An example may serve to illustrate this point:

> Within the past five years two graduate students of an eastern university recorded the traditional songs of the people of St. Lawrence Island, Alaska. These were returned to the university along with their reports of ethnographic research. At a later date the university authorized a major recording company to market

records of this music. No arrangement was made with the two tribal groups of St. Lawrence Island. Although no public outcry has resulted, the people of St. Lawrence Island will state in confidence that they feel their trust and rights have been violated. Since the album of their music is distributed for sale nationally, it would appear that the record company who holds copyright and the university who holds title both stand to profit from sale of the records. This arrangement does not include the people of St. Lawrence Island in any sharing of the profits. (F31) That this can be the basis for considerable misunderstanding among the people with a real interest is understandable.

The scientist or scholar who publishes his findings (or the institution who publishes their compliled resource materials) is following the dictates of science by sharing new knowledge or understanding with others. The individual or cultural group who furnished the information upon which publications or recordings are based feel that their rights of ownership have been infringed upon when they see the finished products available to the public without courtesy of their express permission for this sharing. In some cases it may be a matter of financial or reputational gain that is the cause for censure, but more often is is simply a matter of a feeling of trespass upon communal or individual ownership of literary or artistic property. Although in fact the institution or agency may have reproduced the materials in the public interest, and the people who provided the information did so for equally altruistic reasons, the end result leaves the cultural group, the professional, and the institution or agency with strained relations and a doubtful future regarding any continuance of the task to preserve local cultural heritage. The clarification of the legal status of elements of cultural tradition subject to documentation or recording in any media and a just treatment of the rights of individuals and tribal or institutional entities that may be involved could substantially aid in the interests of all.

"Indian tribes have a status higher than that of states, tribes are subordinate and dependent nations possessed of all powers as such, only to extent that they have expressly been required to surrender them by United States, and the United States Constitution is binding upon Indian nations only where it expressly binds them or is made binding by Treaty or by some Act of Congress." (Native American Church of North America v. Navaho Tribal Council 272 F sd [at 132])

Appropriate to the above are notes regarding a conversation with Assistant Field Solicitor, Office of the Federal Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, in November 1973. Questions were asked about certain legal points being discussed herein. After stating the .. remarks were extended with the qualification that he does not consider himself an authority on Indian Law or Treaties, the Assistant Field Solicitor provided the information paraphrased below: (F32)

It is generally believed that no treaty has ever been executed whereby any Indian or Eskimo group under United States jurisdiction has relinquished sovereignty. The treaties are agreements by and between the Federal Government and the representatives of nations, tribes, or bands of American aboriginal people stating specifically what each will do under given circumstances.

There do not appear to be any settlements in Federal Court that touch upon the problem being described herein. With a broader understanding of civil rights and the increased educational levels being attained by American Indians and Eskimos, the Federal Solicitor's Office anticipates the Courts will be called upon in the near future to determine justice in matters relating to individual Indian and Eskimo rights as well as those of tribal rights and communal ownership in the realm of recording and documenting oral tradition and cultural heritage.

The cases Native American Church of North American v. Navahoe Tribal Council and Gibson v. Hagberg (McKinley Co., New Mex. No. 14,119-72) both treat American citizens of Indian descent as a special class of people. In the first, tribal sovereignty was upheld, and in the second traditionally designed Navahoe jewelry was deemed to be "not goods of the type customarily sold on a recognized market".

Congress saw fit to include in the 1966 revision of the Civil Rights Act of 1964 a special section commonly referred to as the "Indian Civil Rights Act" expressly extending Constitutional guarantees to individuals of Indian descent as expressed in the Civil Rights Act, and at the same time confirming and upholding the powers and authority of the Tribe in matters that come before the courts of Indian offenses on Indian reservations. The "Indian Civil Rights Act" is concerned with individual rights and does not, as such, touch upon the rights

> of Tribe. A definitive treatment for the scope and limitations of tribal jurisdiction, authority, and ownership in matters of property as relates to cultural heritage has yet to be accomplished.

In keeping with the above comments, it should be noted that little policy or practice has been formalized by way of statements or Federal guidelines to protect tribal or communal interest in cultural heritage or oral tradition. Occasional exceptions in practice are found such as those described elsewhere herein for the Pueblo Governors or the regional associations of the Alaskan Natives. A singular practice is found among some tribal divisions such as those communities who forbid visitors to annual dance ceremonies or religious rituals to record, photograph, or sketch the activities while they are in process. Only under tribal permission may such documentation take place. These practices do not, however, directly address the fundamental question of tribal or communal property rights in material production of oral tradition or artistic expression, nor do they exert any control over information obtained from tribal members when they are away from tribal lands. The controls described are more a matter of courtesy and have no clear-cut basis in Federal Statute, Policy, or Indian Law.

Perhaps the present dilemna is best described in a question. How can the Federal Government describe tribal polity as sovereign and still claim the right to view the cultural heritage, particularly oral tradition and artistic expression, as part of National Patrimony and therefore property of the entire U.S. body politic? If Tribes have lost their sovereign powers only to the extent "they have been expressly been required to surrender them by United States" and there is no readily apparent Treaty extant expressly surrendering Tribal ownership for each and every Tribe, it is reasonable to believe that the Tribes do, in fact, own their cultural heritage and any expressions thereof.

"The ownership of unpublished material which is not copyrighted must be determined by common-law principles."
(White v. Kimmell, D.C. Cal. 1050, 94 F. Supp. 502)

The following court decisions will give some idea of the broad scope and application of current copyright law as revised in 1934 and appears in 17 USCA Sec. 1952:

"To constitute a copyrightable "compilation" a compendium must ordinarily result from labor of assembling, connecting and categorizing disparate facts which in nature occurred in isolation; a "compilation" being a synthesis. (Triangle Publications v. New England Newspaper Pub. Co., D.C. Mass. 1942, 46 F Supp. 198.)

"An English translation from the original Hebrew of the five books of Moses and portions of the prophets was copyrightable. (Jesser v. Skalarz, C.C.N.Y. 1839, Fed. Cas. No. 8, 276a)

"A map containing original features that have not appeared in any prior map is copyrightable. (Woodman v. lydiard-Peterson Co., C.C. Minn. 1912, 192F. 67)

"A man has a right to the copyright of a map of a state or county, which he has surveyed or caused to be compiled from existing materials, at his own expense, or skill, or labor, or money. (Emerson v. Davies, C.C. Mass. 1845, 3 Story, 768, Fed. Cas. No. 4, 436)

"Musical composition, containing theme of old song, but differing in words and music, supported copyright claim. (Italian Book Co. v. Rossi, DCNY 1928, 27 F. 2d 1014)

"Only the material embodiment of a musical composition, in the form of writing or print, may be copyrighted. (White-Smith Music Pub. Co. v. Apollo Co. C.C.N.Y. 1905, 135 F. 427, affirmed 147 F. 226, 77 C.C.A. 368, affirmed 28 S. Ct. 319, 209 U.S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628)

"A photograph of a street scene is copyrightable when the result evidences originality in bringing out the proper setting for both animate and inanimate object, with the adjunctive features of light, shade, position, etc.. (Pagano v. Beseler Co., D.C.N.Y. 1916, 234 F. 963)

"Reproductions of a work of art constitute a distinct class of copyrightable material. (Leigh v. Gerber, D.C.N.Y. 1949, 86 F. Supp. 320)

"A copyright never extends to the idea of the work, but only to its expression, and no one infringes the copyright, unless he descends so far into what is concrete as to invade that expression. (National Comics Publications v. Fawcett Publications, C.A.N.Y. 1951, 191 F 2d 594)

"Real occurrences, aside from the form of expression, are not protected by Copyright Act. (Collins v. Metro Goldwyn Pictures Corporation, C.C.A.N.Y. 1939, 106, F. 2d 63)

"One narrating matters of fact may be protected by copyright as to his arrangement, manner, and style but not as to material or ideas therein set forth. (Oliver v. St. Germain Foundation, D.C. Cal. 1941, 41 F Supp. 296)

"A "copyright" is an intangible, incorporeal right in the nature of a privilege or franchise, and is enjoyable as a "legal estate" as other movable personality. (Stuff v. LaBudde Feed & Grain Co. D.C. Wis. 1941, 42 F. Supp. 493)

"Under this section a distinction is recognized between ownership of copyright and ownership of material copyrighted in that the sale of the material copyrighted does not of itself constitute a transfer of the copyright. (National Geographic Soc. v. Classified Geographic, D.C. Mass. 1939, 27 F. Supp. 655)

"Assignment of copyright does not effect a transfer of the property, nor does sale of property effect an assignment of the copyright. (McClintic v. Sheldon, 1943, 43 N.Y.S. 2d 695, 183 Misc. 32 reversed on other grounds 55 N.Y.S. 2d 879, 269 App. Div. 356, motion denied 78 N.Y.S. 2d. 52, 191 Misc. 893)"

The foregoing are presented to afford some description of the breadth, depth, and power of Title 17, U.S. Codes, Copyright. This statute defines what may or may not be copyrighted, and by whom. A premise of this discussion is based upon the assumption that the basis of copyright law is found in the Constitution; copyright law is intended to protect the ownership of the originators of literary or artistic creation; and that it is within the power of Congress to revise copyright law to protect Tribal ownership of cultural intellectual creation as communal properties if in its wisdom it judges this to be a just and Constitutional means. Since the copyright law has not been revised since 1934 and the problem presented here has arisen since that date, it would seem appropriate this avenue to solution be investigated.

This paper presumes that extant law, the needs and obligations of science and scholarly endeavor, and the needs and beliefs of Indians and and Eskimos as they relate to documentation and recording of cultural heritage are not necessarily in conflict. Rather, it is assumed that clarification or revision of existing laws and policies concerning the intent of copyright procedures relative to this issue can do much to solve the problem described

herein. American Indian cultural heritage expressed artistically or orally is the intellectual creation of three discreet and distinct major cultural groups (American Indian, Eskimo and Aleut) together with their language, territorial, political, and customary subdivisions. These cultural groups functioned prior to and independent of the United States Government until they became first the wards and later the citizens of that nation. Even then, and into the present they function socially, politically, and culturally distinct within the framework of the dominant society and government. Their present status individually as full citizens does not alter the fact that they as sovereign units hold communally within each sovereign unit knowledge and understandings regarding their evolution and adaptation through time that is uniquely and distinctly their own.

The ability of tribes to copyright expressions of cultural heritage is not in question. Present conditions that permit non-Indians, institutions, organizations or private business firms to copyright Indian creativity because the tribes have not done so is the issue. Since materials cannot be copyrighted until they are produced in a form that may be copied, statutory application can only be made after the fact. Statute can state who may and who may not copyright Indian cultural expressions and under what conditions it may be accomplished. It may be only an oversight due to the unkown nature of potential commercial value of documented or recorded cultural heritage of American Indians in the past, that present statutes do not encompass these considerations.

The problem arises at the point whereby materials are reproduced in some form so they may be shared by others, regardless of purpose. At this point the question of commercial or applied use of ethnographic information and resource materials becomes a real concern. By law, if materials are to be published or reproduced for sale they fall into two categories, public domain or restricted to reproduction by specified individuals by means of

registering the right to copy the material with the U.S. Copyright Office. Materials in the public domain may be copied by anyone and used by them for their own benefit. As a result few institutions or private firms will publish or reproduce any materials whereby cost is to be covered by sale of the articles without first obtaining a copyright. Since knowledge is shared through distribution of published or similarly reproduced information, non-profit/educational organizations must be as concerned about copyright as is private business, as a measure of economy.

The recording and documentation of cultural heritage is of little use to anyone if it is not made available to those who have a real interest in the information--even if the audience is to be very limited. In order to be made available, such material must be written, recorded, or filmed in a way that is useful and suitable for its intended audience. At the point of reproduction it matters little legally if the oral or written information is in English, Indian, Eskimo, or some other language. Once information is reproduced in a commonly used media it is of potential, if not immediate commercial value. Even when such materials are reproduced solely for educational or local community use, and thus not regarded as the products of a profit-making enterprize, the production still is within the realm of business and subject to all manner of economic factors from reproduction to distribution and/or marketing. Thus, once Indian oral tradition or artistic expression has been documented or recorded it becomes reproduceable and potentially of commercial value. For this reason alone the matter of ownership, title, and copyright of documented or recorded Indian and Eskimo cultural heritage should be encompassed within U.S. Statutes. In the United States anything to which a dollar value may be attached becomes a matter for attention of the court system sooner or later. Unless preventive action occurs to clarify points of law regarding tribal ownership and title of tangible manifestations of cultural heritage it is reasonable to expect the

prediction made by the Albuquerque Federal Solicitor's Office to come true. That is, that the courts will be called upon in the near future to determine individual and tribal rights and communal ownership in the realm of recording and documenting oral tradition and cultural heritage.

> RIGHT OF FIRST PUBLICATION: The common-law right, sometimes called "copyright before publication," which an author has to his own writings and to a control of their publication, as distinguished from "copyright after publication" which is the right to multiply copies secured by statue." (6 R.C.L. 1097, 1099) (R12)

In the modern world that is oriented toward personal and private ownership it is difficult to grasp the concept of communal ownership of intangibles--particularly when those intangibles are the communal holdings of inheritance as is found in the cultural heritage of Indians and Eskimos. If the first lines of the above quotation were changed to read: The common-law right, sometimes called "copyright before publication," which a Tribe or member of a Tribe has to their own oral narrations and to a control . . ., it would describe the moral right many Indians, scholars, and scientists feel should apply to reproduction of materials related to preservation of cultural heritage. Since World War II public interest and appreciation of American Indian cultural heritage has become generalized and is reflected in the content and amount of entertainment associated with "Indianess". Scientists, scholars, journalists, creative writers, and VISTA workers have moved wholeheartedly into the lands, lives, and affairs of American Indian people, regardless of their own ethnic affiliation and with or without invitation. Technology has provided convenient and inexpensive tools to record anything human beings may say or do. It has also made many parts of the United States conveniently accessible to anyone who desires to study or record the past or present of any group residing in the nation.

Educational and technological change have brough about external and internal emphasis related to assessment of Tribal authority and jurisdiction, civil liberties for persons who are of Indian descent, and a greater awareness of of cultural identity with an appreciation for the unique qualities of life-style and history of Indian people.

Until this point in time anyone interested in documenting or recording the cultural heritage of Indian people in the interest of science or "the public" operated on the assumption of a priori rights for which there is no established legal basis. With the recognition of tribal sovereignty by Federal Government and the States and the gradual reduction of authority for the "Indian agent" a policy known as "self-determination" began to take effect in contractual arrangements between Tribes and Government whereby many civil and governmental administrative matters come under tribal jurisdiction. Today, through a combination of exertion of tribal authority, social pressure, ethics, and courtesy little ethnographic research is conducted on the reservations of the contiguous states without the permission of the Tribe. This mutually self-imposed system permitting tribal control in ethnographic research seldom extends to recording or documenting with Indian people outside of the reservation. There is no established policy or custom regarding ethnographic research for the entire population of Alaskan Native people, their villages or regional corporations.

According to the Bureau of Indian Affairs there are an estimated more than six hundred thousand American Indians residing on approximately forty million acres of reservation lands holding tribal affiliation among three hundred ninety reservations, rancheros, and communities. These are persons on tribal rolls and it does not include those who have assimilated into the cities. Additionally there are more than eighty thousand Alaskan Natives, according to their latest enrollment figures, in one hundred twenty seven villages and the cities of Alaska.

Examples have been given in the previous pages of instances when Indians of the reservations and Alaskan Natives have taken the initiative to establish precedents in action to protect communal and tribal ownership or title to cultural heritage in any form suitable for reproduction in any mass media. Although these may be steps in the right direction to ultimately bring about workable solutions for handling the products of cultural heritage preservation they lack enforcement capability or the means to extend the procedures beyond mutual cooperation of Tribe, scientist or scholar, institution and Government.

In a nation that takes pride in a body of law founded upon Constitutional priciples and codified in the effort to apply its laws so they are ". . . broad enough to reach every portion of the state and to embrace within its provisions every person or thing distinguished by characteristics sufficiently marked and important to make them clearly a class by themsleves . . . , even though there may be one member of the class or one place on which it operates," it seems the time is appropriate for Congress and the Judicial Branch of Federal Government to define and determine clearly and functionally the scope and limitations of tribal sovereignty and the relationship this bears to ownership and title of the tangible results of cultural heritage preservation--the documents, recordings, records, photographs, television tapes, and films.

FINDINGS AND CONCLUSIONS

Investigation prior to compiling this paper involved interviews with specialists in Indian Law, civil law, and general legal practice; Indian, Eskimo and Aleut leadership and individuals with a real interest in Indian cultural heritage preservation; anthropologists, archeologists, and ethnographers; private publishers; editors of university presses; and Bureau of Indian Affairs administrative personnel at agency, area, and department levels. A survey of literature and court cases recommended by various individuals among the above was conducted, and informative bulletins and other publications from the U.S. Copyright Office, U.S. Department of the Interior, National Parks and the Alaska Congressional Delegation were obtained and used as reference materials. Drawing upon these sources and the foregoing discussion, the following facts are presented:

1. Approximately 680,000 American citizens are termed Indian by virtue of genetic descent from aboriginal Eskimos, Aleuts, and American Indians who presently are listed on tribal enrollments and are subject to Tribal Authority.
2. American Indian Tribes enjoy an authority and jurisdiction over their members greater than the governmental powers held by individual states within the Union.
3. The Federal Government deals with the Tribes as sovereign nations whereby Government and the Tribe agree to specific conditions for specific circumstances acknowledging that the Tribe is a subordinate and dependent nation within the United States.
4. Tribes, as autonomous nations predate the founding of the United States, and as semi-autonomous nations postdate that founding to the present.
5. Within the Tribes individually and severally there exists a body of knowledge refered to as cultural heritage. Preservation of this

heritage through scientific or scholarly endeavor on behalf of Tribal Patrimony and/or National Patrimony is generally viewed by Government, the Tribes, scientists and scholars, and the public as valuable, worthwhile, and necessary.

6. Federal Statute, policy, or regulation does not deal specifically with matters relating to Tribal ownership, title, jurisdiction, or control over the documentation, recording, reproduction, distribution, or sale of tangible materials that are the product of scientific, scholarly, or other technically qualified endeavor using as its foundation the oral or artistic expressions (intellectual creations) obtained from members of a Tribe.

7. Recent practices by the Federal Government through its Bureau of Indian Affairs and Division of National Parks, and certain of the Tribes in requiring written agreements or ethnographic permits have set precedents in action whereby Tribal ownership, jurisdiction, or control over products of effort in cultural heritage preservation is a matter of fact.

8. Precedents, as described above, are based upon ethical considerations and tribal values of communal ownership of cultural heritage. They are not founded upon statute.

9. Without a firm foundation in extant law or code, these precedents lack enforcement qualifications and any questions that might arise in their application can only be resolved concretely through the Courts.

10. The principles of the Constitution extend to all American citizens and classes of citizens. Tribes, by virtue of their special treatment by Federal Government are a special class of citizen.

11. Documentation and recording of oral literature, in particular,

is seriously hampered because no clear-cut legal basis for establishing right of ownership to materials based upon Indian knowledge and information exists. It is further hampered because many scholars, scientists, and Indian people are aware of the potential commercial value of documented or recorded ethnographic materials, the professional ethics and Indian values involved, and the equivocal position in which they may place themselves if they become actively involved in efforts related to cultural heritage preservation of any tribe.

12. Article I, Section 8 of the Constitution deals with the exclusive rights of authors and inventors to their writings and discoveries. American Indian cultural heritage is not a matter to be"discovered", it is known to exist. Elements of that heritage not yet known to the general public are largely in the form of oral literature and artistic expression in the form of ceremony, ritual, music, song, dance, and symbolic graphic art held in the memory of living people and known and respected by the Tribes. Indian people, past and present are the authors and inventors of those elements of cultural heritage that science, scholars, and others seek to record in ways that may be reproduced for mass media.

American Indians, Aleuts, and Eskimos are the creators, authors, inventors, and heirs of their cultural heritage. Upon this premise, the following conclusions may be based:

1. Since Federal Government deals with the tribes individually or geographically by specific Treaty or Congressional Act, with the former being discontinued in 1871, it is imcumbent upon Congress

to clarify and determine the legal status of Tribes as regards ownership, title, and control of Tribal Patrimony.

2. The involvement of Indian persons in the preservation of cultural heritage and the protection of their individual rights as authors, inventors, or artists is the responsiblity of Tribal Authority, although it may be secondary to Tribal concern over content or subject matter for which they are responsible.

3. The Antiquities Act and U.S. Copyright Law have some bearing upon preservation of Indian cultural heritage. Since the Antiquities Act deals with safeguarding tangible evidence of man's past it can serve as a vehicle through interpretation or revision to safeguard Tribal ownership or and interest in artifacts, ethnographic materials, and/or old documents and papers relating to Tribal affairs found on Tribal lands. The Copyright Law sets forth what may be copyrighted and by whom. Clarification or revision of the law to specifically treat the oral literature and artistic and graphic expressions of traditional cultural nature as communally owned Tribal heritage in creative original products of intellect is tenable according to the precepts and interpretations regarding application of the Constitution on behalf of the governed.

Steps toward solving the problem as presented may be taken singly or in combination. Some of the alternatives suggested by the foregoing pages are:

1. Congressional: Through established procedures, Congressional action can be taken to define, describe, and subsequently determine the scope and limitation of Tribal sovereignty for all Tribes of the United States. A part of that process would include a statement of Tribal authority and jurisdiction over each Tribe's cultural

heritage and a definitive treatment of Tribal Patrimony according to that which is the property of Tribe and that which is of common heritage and part of the National Patrimony.

2. Departmental: The Federal Solicitor, on behalf of the Department of the Interior may rule on the extent and effect of Tribal sovereignty as it relates to documentation and recording of Indian cultural heritage and the reproduceable products that may result from such actions. He may also rule on matters of title and ownership as it may relate to the Tribal authorities. These are arbitrary rulings and are subject to court test.

3. Judicial: Tribes, organizations, and institutions may seek ajudication from the lower courts to the Supreme Court by suit on behalf of individuals or as a class actions to establish legal precedents regarding communal or tribal right, ownership, or title to reproduceable products wherein content or subject is clearly traditional oral or artistic creation of the Tribe.

4. Tribe: Tribes may individually or severally petition Congress or the Federal Solicitor to establish by Act or Ruling all or any portion thereof the conditions described above; or they may institute suit on behalf of Indian individuals or the Tribe to find on their behalf right, ownership or title in specific events involving specific persons, institutions, or agencies.

5. Institutions, organizations, and agencies: By investigating legal foundations through the Federal Solicitor's Office and private attornies, institutions, orgainzations, and agencies may continue and expand current practices where Tribal control of the products of cultural heritage preservation among Indians is exercised through cooperative arrangement and mutual courtesy, trusting that by virtue of accepted practice this will become customary and serve

as precedent should the matter be brought to trial in the future. These entities may also petition the Federal Solicitor for a ruling on behalf of their own interests or responsiblities.

6. Laissez-faireism: Matters can continue as the present. In time parties from individuals to Government may find it necessary to bring the issues of Tribal soveriegnty, cultural heritage preservation among Indians, Tribal Patrimony, reproduction of ethnographic documentation and recording, and ownerhip, title, and physical possession of ethnographic resource materials to the courts on a one-by-one and case-by-case basis.

SUMMARY

"Ask first before you take anything."
(tr. Kauweramiut Eskimo commandment [R23])

In light of the discussion presented, it is concluded that morally and ethically elements of cultural heritage of the American Indians, Aleuts, and Eskimos that lend themselves to ethnographic research methods and electronic or photographic recording are by virtue of a priori right and possession the intellectually created property of the Tribes and their members. According to the Bureau of Indian Affairs, most tribes have an elected representational form of government empowered with authority to speak and act on behalf of the Tribe, to represent it in negotiations with Federal, state, and municiple governments and private business or institutions. Tribal or village councils arbitrate or regulate the domestic relations of members, prescribe rules of inheritance for private property of members, levy taxes, regulate property under the Tribe's jurisdiction, pass legislation in tribal matters, and administer justice. The means and resources necessary for preservation of cultural heritage through documentation and recording are two different things. The means usually involve financial or technical assistance from Government, institutions, or private individuals. The primary resource is the source of cultural expression--the Indian people themselves. With the authority and responsiblity exercised by the tribes listed above, there is ample evidence that the capability and structure are present for Tribes to control and administer ethnographic research and similar endeavors with the power to receive the results as communal property of the tribal authority. Federal Government, as the dominating sovereign nation, in accordance with the principles of its Constitution, has a duty as well an obligation to the Indian people of the United States to initiate action in keeping with the policy statements of its leaders to render unto the Indian people that which is theirs by inheritance and possession, and to clearly differentiate between that which is theirs and that which is held in common bond by the populace.

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